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In the Supreme Court of the United States

October Term, 1959

CONTINENTAL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 1a–27a) is reported at 266 F. 2d 208. The orders of the Federal Power Commission issuing a certificate (Pet. App. 41a–51a; R. 190–197) and denying rehearing (Pet. App. 52a–59a; R. 258–262) are reported at 18 FPC 296, 528.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1959 (Pet. App. 28a). The petition for a writ of certiorari was filed on July 11, 1959. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

This case involves the operation by an independent producer, for an admittedly jurisdictional sale to a pipeline, of part of the "Christmas tree" at the head of a gas well. The questions presented are:

1. Whether the decision of the court of appeals was based on an independent ground not advanced by the Commission.

2. Whether the producer's well-head facilities at the point of delivery to the pipeline are facilities for a jurisdictional sale and therefore subject to the jurisdiction of the Commission, rather than facilities for production and within the statutory provision exempting "production" from such jurisdiction.

3. Whether the producer's well-head facilities at the point of delivery are, alternatively, subject to the jurisdiction of the Commission as facilities for a jurisdictional sale even though they also are facilities for production.

STATUTES INVOLVED

Sections 1(b) and 7(c) of the Natural Gas Act (15 U.S.C. 717(b) and 717f(c)) are set forth in the Appendix to the Petition at pages 29a–30a.

STATEMENT

Petitioner, an independent producer of natural gas, owns well-head facilities, including part of the "Christmas tree" apparatus (see photograph facing Pet. 6), and sells at the well-head to an interstate pipeline. Petitioner drilled the well, constructed the

facilities, and commenced deliveries prior to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, that independent producers which sell gas in interstate commerce for resale are "natural-gas companies" and therefore subject to regulation under the Act. As a result of that decision and the Commission orders which followed, petitioner applied for a certificate under protest, at the same time requesting a declaratory order of non-jurisdiction.

Petitioner urged in its briefs to the court of appeals, as it had before the Commission, (a) that the Commission lacked jurisdiction over any of the well-head facilities, including its portion of the "Christmas tree"; (b) that the Commission must specify the particular facilities over which it asserts jurisdiction; and (c) that the Commission lacked jurisdiction over the sale to the pipeline. On oral argument below, petitioner abandoned its second and third points and does not present them to this Court.

The relevant facts are undisputed. Petitioner owns the well casing and part of the "Christmas tree" consisting essentially of two valves and some connecting fittings. While these valves are capable of shutting-off the flow of gas (and were so used for some months between completion of the well and commencement of deliveries), they are not suited to use for controlling the flow. Petitioner's facilities end in a threaded four-inch aperture at the top of the upper of the two valves, into which the pipeline's facilities are screwed. Delivery of the gas is effected at that point.

The Commission held the portion of petitioner's facilities which contains the gas at the point of delivery to be a jurisdictional facility and certificated its continued operation. The Commission, looking from the point of delivery downward, found it unnecessary to determine just how far the jurisdictional portion of the facilities extended (Pet. App. 54a–55a). Although the court of appeals by way of *dicta* examined the facilities from the ground upward (Pet. App. 5a-6a), it *held* that at least the upper aperture[1] of the upper valve was a jurisdictional facility (Pet. App. 6a).

ARGUMENT

Petitioner's basic contention is that its well-head facilities, including its portion of the "Christmas tree" apparatus, were not facilities for interstate sale requiring a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), but were instead facilities for production excluded from Federal Power Commission jurisdiction by Section 1(b) of the Act, 15 U.S.C. 717(b), which exempts the "production or gathering" of natural gas from the coverage of the Act. Both the Commission and the court of appeals, however, held that petitioner's facilities were facilities for a jurisdictional

[1] Petitioner states (Pet. 18) that the court's "adjudication" was "that the top valve of the christmas tree is solely a sales facility." However, the court's holding, like the Commission's, applies to the point of delivery at the upper aperture of that upper valve: "* * * production, as the term is used in this statute, was complete at or before the passage of the gas through the upper aperture of the upper valve." 266 F. 2d at 212; Pet. App. 7a.

sale and this determination is correct under the principles laid down by this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682. Petitioner neither raises any serious question of federal law requiring clarification by this Court, nor cites any conflicting decisions in other circuits. In fact, two other courts of appeals have sustained the jurisdiction of the Commission over producer or gatherer facilities despite similar objections. *Saturn Oil & Gas Co.* v. *Federal Power Commission*, 250 F. 2d 61 (C.A. 10), certiorari denied, 355 U.S. 956; *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550 (C.A. 3), certiorari denied, 352 U.S. 971. Moreover, in all of the hundreds of instances in which sales by independent producers, in a variety of factual patterns, have been certificated, the Commission, as in the instant case, has also certificated the operation of facilities for such sales. Although the petition touches upon various peripheral questions which are conceivably lurking in the background of the case, such questions do not demand immediate consideration and should not be settled on this record.

1. Petitioner claims that the rationale of the Commission's order, that petitioner's facilities were facilities both for sale and production, was rejected by the court of appeals which based its decision on its own independent finding that some of petitioner's facilities were purely facilities for sale and not production (Pet. 7–9, 17–18). Petitioner further argues (Pet. 8, 17–18) that such a finding is invalid since the power of the court of appeals is limited to

deciding "whether there was substantial evidence to support the Commission's findings and whether the Commission's order was within the ambit of its statutory authority" (Pet. 8). In fact, however, as the court of appeals properly held (agreeing with the argument of the Commission below), the Commission's orders rested on two independent grounds: *first,* that petitioner owns jurisdictional facilities at a point in the "Christmas tree" where production is already completed; and, *second,* that, in any event, petitioner's facilities were within the jurisdiction of the Commission even assuming they perform the dual functions of effecting the sale and the production (Pet. App. 4a). The court of appeals stated that "a strong argument can be made" for the second proposition (Pet. App. 4a), but based its affirmance on the first ground (Pet. App. 5a). Thus, the court of appeals made no independent findings, but rather merely chose between alternative holdings of the Commission.[2]

2. The first alternative ground for the Commission's decision would limit the certificated facilities to a minimum, by not asserting jurisdiction over production facilities. The Commission reasoned that the gas sold here as a commodity in interstate commerce cannot be sold until it has been reduced to possession and that this reduction to possession prior to sale completes production since production of natural gas is

[2] Petitioner, significantly, insisted in the court of appeals that only the first ground, the exclusive-function rationale, underlay the Commission's order (Reply Brief of Petitioner, pp. 13–14). Now that the court of appeals has adopted this rationale, petitioner is claiming that the Commission's decision was based on a different ground.

just that—the reduction of gas to possession (Pet. App. 46a–47a, 52a–53a). See *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 586, cited by the Commission (Pet. App. 53a). Hence, the facilities by which it is possessed, *i.e.*, the containing facilities at the point of delivery, are facilities at or beyond the point at which production is completed, and are not facilities for production.

3. The Commission was also correct in finding that petitioner's facilities, being facilities for a jurisdictional sale, were within the Commission's jurisdiction even if they were likewise facilities for production. In *Phillips, supra*, this Court stated that "we have difficulty in perceiving why the Commission's jurisdiction over the transportation *or* sale for resale * * * is granted in the disjunctive" in Section 1(b) when "[i]t would have sufficed to give the Commission jurisdiction over only those natural-gas companies that engage in 'transportation' or 'transportation *and* sale for resale' in interstate commerce, if only interstate pipeline companies were intended to be covered." 347 U.S. at 681–682. Similarly, the "sale" portion of the "transportation or sale" clause of Section 7(c) would have no meaning unless the disjunctive grant of jurisdiction applied to the sale and delivery facilities of a producer-seller whether or not "production" was considered to be technically completed. Moreover, this Court has made clear that the intent of Congress in passing the Natural Gas Act was to give the Commission broad powers for effective public regulation of the industry and has therefore held that the production and gathering exemption is to be strictly con-

strued. *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* 331 U.S. at 690–691; *Phillips Petroleum Co.* v. *Wisconsin, supra,* 347 U.S. at 679–680, 685. Since in the instant case the certificate regulation was plainly aimed at sales, not physical production or gathering, the exemption should be narrowly interpreted so as not to interfere with the broad intent of Congress.[3]

4. The present decisions of the Commission and the court of appeals are supported by the *Saturn* and *Huber* decisions, *supra.* In the former, contrary to the present petitioner's contention that only an issue of sales not facilities was involved (Pet. 16), the Court of Appeals for the Tenth Circuit made clear that the objection was raised "that the effort to certify production facilities violates the production or gathering exemption." 250 F. 2d at 69. Moreover, the court, in rejecting that objection, stated that "[t]he test is whether the continued operation of a facility is necessary to the delivery of the gas sold." *Ibid.* And the facts in *Saturn* were virtually identical with those here, the only difference being that, while the purchasing pipeline there, as here, regulated the flow of the gas, it used a valve owned by the producer to do so.

[3] As the court of appeals noted (Pet. App. 8a), the Commission's important regulation of the abandonment of a sale under Section 7(b), 15 U.S.C. 717f(b), depends on whether the Commission has jurisdiction over facilities by means of which such sale is made. In the present case, the choke owned and operated by the pipeline to control the volumes delivered might provide additional jurisdictional facilities supporting Commission jurisdiction under Section 7(b) over abandonment of this sale.

While petitioner attempts to distinguish *Huber* on the ground that "clearly" sale facilities were involved (Pet. 16–17), the Commission had certificated a facility, similar to the "Christmas tree" here, which used valves and pipes to effect the delivery and sale of natural gas. The Court of Appeals for the Third Circuit held that the "gathering" portion of the "production or gathering" exemption of Section 1(b) did not exclude the jurisdiction of the Commission because "[t]he Phillips decision makes such facilities, sales facilities." 236 F. 2d at 556.[4]

5. Petitioner objects that the decision below endangers its freedom to drill and equip wells by placing producers between strict state regulation for conservation purposes and federal regulation as to the same activities (Pet. 11, 18–19). Since, however, petitioner's facilities were constructed prior to this Court's *Phillips* decision, at a time when the Commission disclaimed jurisdiction over independent producers, the facts of this case pose no such issue. But, in any event, the Commission has not attempted to require certificates for *construction* of producer facilities, but only for operation of facilities for jurisdictional sales. Where additional wells are drilled on acreage already dedicated to jurisdictional service no

[4] Petitioner's reliance (Pet. 7–8, 15–16) on *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, is misplaced. That case, which raised abandonment issues under Section 7(b) of the Act, merely holds that a pipeline's *undeveloped* subterranean gas reserves are not jurisdictional "facilities" and so may be alienated without Commission authorization. It does not govern this case, in which the producer's well-head facilities are operated to effect the jurisdictional sale.

problem arises; the initial certificate covers facilities for sale from the acreage, not particular wells. Where a well is drilled on undedicated land, Section 7(c) probably does not apply since at that stage the producer, who cannot know what disposition he will make of the gas (or even whether gas will be reached), has not undertaken the construction for a jurisdictional sale. Furthermore, the Commission has not hesitated to avoid unnecessary regulation by construing the term "facilities" in Section 7(c) to exclude those facilities which merely replace unserviceable ones, without causing any appreciable change in the service rendered. 18 C.F.R. (1958 Cum. Supp.) 2.55(b). And the Commission has expressly sought in its abandonment regulation applying to independent producers to avoid conflict with state regulation (18 C.F.R. (1958 Cum. Supp.) 157.30):

> That nothing herein shall be construed as interfering or as intended to interfere with or to prevent compliance by a natural-gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

If petitioner's bare allegations of interference with local regulation (Pet. 18–19) are meant to encompass further problems, they are not demonstrated by this record. Cf. *Interstate Natural Gas Co.* v. *Federal Power Commission, supra,* 331 U.S. at 690–692.

6. Petitioner also insists that the "uncontradicted evidence" of its engineering witness that its "Christmas tree" was a facility for production and not for sale is binding on the Commission (Pet. 17). Of course, the undisputed testimony as to the evidentiary facts being adjudicated must be, and was, accepted.

But petitioner's opinion testimony as to ultimate conclusions to be drawn from such facts is not binding. Construction of the statutory terms "facilities," "sale," and "production," as well as their application to the evidentiary facts established, is a task for the Commission, subject to judicial review. See Jaffe, *Judicial Review: Question of Law*, 69 Harv. L. Rev. 239 (1955); cf. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 Vand. L. Rev. 470 (1950). Here, as the court of appeals held (Pet. App. 6a–7a), the Commission's orders were based on the determination that, as these terms are used in the statute, a portion of "Christmas tree" was, alternatively, either a facility for sale and not for production, or a facility for both sale and production (see *supra*, pp. 5–6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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